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THE LAW OF DEFAMATION.

THE PRIVILEGE OF COUNSEL.

The privilege of counsel in England is based upon the principle that it is necessary to the due and proper administration of justice that counsel should be absolutely free and unfettered in the discharge of their duties. In *Kennedy* v. *Brown*[1] ERLE. C. J. says : "The advocate is trusted with interests and privileges and powers almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of the human soul. * * * His words and acts ought to be guided by a sense of duty—that is to say, duty to his client—binding him to exert every faculty and privilege and power in order that he may maintain that client's right together with duty to the court and himself binding him to guard against the abuse of the powers and privileges intrusted to him by a constant recourse to his own sense of right."

Again in *Munster* v. *Lamb*,[2] which settled the law in England on this subject, the Master of the Rolls says: "If any one needs to be free of all fear in the performance of his arduous duty, an advocate is that person. His is a position of difficulty: he does not speak of that which he knows, but he has to argue, and to support a thesis, which it is for him to contend for; he has to do this in such a way as not to degrade himself; but he has to do it under difficulties, which are often pressing. If in this position of difficulty he had to consider whether everything which he uttered were false or true, relevant or irrelevant, he could not possibly prefer his duty with advantage to his client; and the protection which he needs and the privilege which must be accorded to him is needed and accorded above all for the benefit and advantage of the public."

1. (1862) 32 L. J. C. P. (N. S.) 137. 2. (1883) 11 Q. B. 588.

Under the English law a counsel is absolutely privileged for anything which he may say during the course of a judicial proceeding, whether the same is said maliciously or be irrelvant to the cause. (*Vide* ODGERS on *Libel*, p. 225, 4th Edition). This doctrine of English law, however, has been of gradual growth. The earlier English cases only went so far as to hold that a counsel was privileged (1) if what he said was pertinent to the cause, or (2) if what he said was according to his instructions.

In *Brook* v. *Sir Henry Montague*[1] the court held that "a counsel in law retained hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, being pertinent to the matter in question, and not to examine whether it be true or false; but it is at the peril of him who informs him." In *R.* v. *Skinner*,[2] however, LORD MANSFIELD C. J. said: "Neither party, witness, counsel, jury or judge can be put to answer, civilly or criminally, for words spoken in office." This case is referred to in *Munster* v. *Lamb*[3] and appears to lay down for the first time the doctrine of absolute privilege with regard to counsel. In *Hodgson* v. *Scarlet*[4] it was held by LORD ELLENBOROUGH C. J. that "an action for defamation will not lie against a barrister in a cause pertinent to the matter in issue." In *Kennedy* v. *Brown*,[5] ERLE C. J. laid down the doctrine of absolute privilege in the language already stated. In *Dawkins* v. *Lord Rokeby*[6] the Court of Exchequer Chamber presided over by KELLY C. B. and consisting of nine judges held that "the authorities are clear, uniform and conclusive, that no action of slander lies, whether against judges or witnesses or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law." *See* also *Floyd* v. *Barker*[7] and *Revis* v. *Smith*.[8] In *Wood* v. *Gunnton*[9], GLYNN C. J. says: "It is the duty of a counsellor to speak for his client, and it shall be intended to be spoken according to his client's instructions." In *Flint* v. *Pike*[10], BAYLEY J. says: "The law presumes that he acts in discharge of his duty, and in pursuance of his instructions." The decision of the court of

1. (1606) Cro. Jac. 90.
2. (1772) Lofft 85.
3. (1883) 11 Q. B. 588.
4. (1818) 1 B. & A. 232.
5. (1862) 32 C.J.C.P. (N.S.) 137.
6. (1873) L. R. Q. B. 255.
7. (1607) 12 Reports 24.
8. (1856) 18 C.B. 126 S.C. 25 L.J. (C. P.) 195.
9. Style, 462.
10. (1824) 4 A. and E. 473.

Appeal in *Munster* v. *Lamb*[1], however, removes all limitation whatever on the absolute privilege of an advocate for all words uttered in the course of his duty.

Turning to the Indian law on the point, we find a division of opinion. The Madras High Court on the one hand has followed the English law on the point in its integrity, whilst the High Courts of Calcutta, Bombay and Allahabad have refused to follow the English rule, and have held that S. 499, with its ten Exceptions, of the Indian Penal Code is exhaustive on the subject, and that unless a counsel comes within exception 6 of the code he is not privileged. The Chief Courts of Mysore and Burma have followed the Bombay and other High Courts. Before discussing the relative value of these two rulings, I propose to briefly review the leading Indian cases on the point.

In *Sullivan* v. *Norton*[2], a full Bench of the High Court of Madras consisting of SIR ARTHUR J. H. COLLINS, Kt., C. J., Mr. Justice KERNAN, Mr. Justice MUTHUSAMI AIYAR, Mr. Justice BRANDT and Mr. Justice PARKER held that "an advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate." The English authorities were gone into at length and their Lordships held that the law as laid down in *Munster* v. *Lamb*[1], was good law in India. The Chief Justice, in meeting the argument advanced by the Advocate-General that the rules of the English Common Law did not apply to advocates in this country in cases of defamation —S. 499, Indian Penal Code — and that a person uttering defamatory words against another would be guilty of defamation unless he came within the 9th exception given by the Act, said that the Common Law is that an advocate is not civilly or criminally responsible for anything he may say in his office as advocate. The courts in this country are undoubtedly bound to administer, within the original jurisdiction, *inter alia*, the common law as it prevailed in England in the year 1726, and which has not been subsequently altered by statutes especially extended or by the Acts of the Legislative Council of India. The other judges concurred in this view. In *Raman Nayar* v. *Subrahmanyar*[3] it was held that " the English authorities on the subject

1. (1883) 11 Q. B. 588. 2. (1886) I. L. R. 10 M. 28.
3. (1893) I. L. R. 17 M. 87.

apply to India." See also *Narayana Chariar* v. *Ranga Aiyangar.*[1] In *Pachaiperumal* v. *Dasi Thangam*[2] it was laid down that the dictum "no action lies whether against judge, counsel, witness or parties for words written or spoken in the ordinary way of any proceeding before any Court or tribunal recognised by law" will also apply to an accused person "in respect of questions put by him in good faith for the purpose of defending himself." In *In re Nagarji* v. *Trikamji*[3] it was held that "in the case of an advocate, when express malice is absent, a court having due regard to public policy, would be extremely cautious before depriving him of the protection of exception 9, S. 499, of the Indian Penal Code." Held also "that *Sullivan* v. *Norton*[4] is not an interpretation of S. 499." Held further "that the I.P.C. should be construed without reference to the English law." In *Emperor* v. *Purshottomdas Ranchordas*[5] it was held by Mr. Justice CHANDAVARKAR and Mr. Justice KNIGHT that "when a pleader is charged with defamation in respect of words spoken or written, while performing his duty as pleader, the court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose." In *Abdul Hakim* v. *Tejchandar Mukerji*[6] it was held by Mr. Justice STRAIGHT and Mr. Justice TYRRELL that "the law of defamation which should be applied in India for defamation is that laid down in the I. P. C. and not the English law of libel and slander." In his judgment Mr. Justice STRAIGHT said: "No doubt the principles enunciated in numerous English decisions bearing on the point strongly favour this contention. But we do not consider that we are arbitrarily bound to follow these precedents or to adopt them as conclusively applicable to all libel or slander in our Courts. The state of society and the condition of things in the two countries is wholly dissimilar, and to lay it down as an inflexible rule that any false and malicious statements, no matter how defamatory, may be made with impunity if only embodied in a petition filed in reference to some pending case,

1. (1891) 2 M. L. J. 94.
2. (1908) I L R. 31 M. 400.
3. (1894) 19 B, 340.
4. (1886) I. L. R. 10 M. 28.
5. (1907) 9 Bom. L.R. 1287.
6. (1881) I.L.R. 3 A. 815.

could not but entail the most mischievous consequences." In *Isuri Prasad Singh* v. *Umrao Singh*[1] Mr. Justice AIKMAN held that "the principles of English law did not apply to prosecutions for defamation under the Indian Penal Code." In his judgment he said: "It may be true that the principles of public policy according to English law and some Indian decisions ought to guard the statements made by accused persons for their own protection. But when there is a substantive law which can be appealed to for information and guidance, the safer course is to look to ascertain some intelligible rule or rules by which the determination of cases like the present should be regulated. The Indian legislature might, had it chosen, have so framed S. 499 of the I. P. C. as to afford to parties, counsel and witnesses in this country the same protection against indictment for defamation, which they have in England. The fact remains that it has not seen fit to do so." In *Emperor* v. *Ganga Prasad* [2] —in the case of a witness—SIR G. KNOX C. J. and AIKMAN J. held the Penal Code was to be applied. In *Queen* v. *Pursotam Das*[3] KEMP and GLOVER JJ. of the Calcutta High Court ruled that "the case was considered as governed by the provisions of the Indian Penal Code."

In *Green* v. *Delaney*[4], PHEAR and JACKSON JJ. held that "the criminal law of this country with regard to defamation depends on the construction of S. 499 of the Penal Code and not in what may be the English law on the same subject." In *Augada Ram* v. *Namai Chand*[5] it was held by SIR W. COMER PETHERAM C. J. and Mr JUSTICE RAMPINI that "the law of defamation in India was contained in S. 499 of the I. P. C. with its ten exceptions."

It will be seen from the cases quoted that in the case of the Calcutta and Allahabad High Court the question of counsel's privilege has not come directly before the courts. But it is submitted, that it is clear from the law applied in the case of defamatory statement in pleadings, that should the point ever arise, the Calcutta High Court will follow the ruling of the Bombay High Court in *In re Nagarji* v. *Trikamji*[6]; whereas the

1. (1900) I. L. R. 22 A. 234.
2. (1907) I. L. R. 29 A. 985 (F. B.)
3. (1865) 3 W. R. Cr. 45.
4. (1870) 14 W. R. Crp. 27.
5. (1896) I. L. R. 23 C. 867.
6. (1894) I. L. R. 19 Bom. 340.

Allahabad High Court will apply exception 9 of S. 499 read together with S. 105 of the Evidence Act, that is, good faith will not be presumed, but the accused will have to prove the same.

The view taken by the Madras High Court, it is submitted, is wrong for the following reasons :—

(1) The Privy Council has repeatedly held that the courts in India should confine themselves to their codes and not attempt to explain or add to the same by reference to English authorities. (*Vide Crawford* v. *Spornee*[1], *Mooshee Burloor Rahem* v. *Shunesoomissa*[2] and the preface to Mayne's *Criminal Law.*)

(2) The essence of a code is that it is exhaustive. Of course some codes do not profess to be exhaustive, *e.g.*, the Indian Contract Act. The same cannot, however, be said of the Indian Penal Code, which is undoubtedly a most carefully drafted statute. There are nine exceptions to S. 499 of the Penal Code which specify nine different occasions in respect to which defamatory imputations are privileged: and as it would have been easy to have embodied in a single exception, a general definition of what constitutes a privileged communication, it must be taken that this enunciation of occasions was intended to be exhaustive.

See also in this connection the observations of Justice AIKMAN above quoted in *Isuri Prasad* v. *Umrao Singh*[3]. The argument of the Chief Justice in *Sullivan* v. *Norton*[4] about the applicability of English law carries on its face its condemnation as the Indian Penal Code is an enactment of the Legislative Council of India.

The view taken by the Bombay High Court, it is submitted, is also wrong.

The Bombay High Court holds that in cases of defamation the Indian Penal Code is to be looked to and not the English law on the subject, and that a counsel to be privileged must come under exception 9 of S. 499 of the I. P. C. At the same time the Bombay High Court holds, with strange inconsistency, that good faith is to be presumed in favour of counsel. This is in direct contradiction of S. 105 of the Evidence Act, which lays it

1. (1846) 4 M. I. A. 179 at 187.
2. (1867) 11 M. I. A. 551 at 604.
3. (1907) I. L. R. 29 A. 985 (F. B.)
4. (1886) I. L. R. 10 M. 28.

down that when a person is charged with any criminal offence the burden of proving the circumstances bringing the case within any of the general exceptions in the I. P. C., or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him and the court shall presume the absence of such circumstances.

Sir GEORGE KNOX, in his judgment in *Isuri Prasad* v. *Umrao Singh*[1], considers this objection at length and is of the opinion that it is a valid and sound objection.

The view taken by the Allahabad High Court, namely, that all questions of defamation are to be decided not by reference to the English law on the subject but by S. 499 of the I. P. C., read together with S. 105 of the Evidence Act, is, it is submitted, a view in accordance with law.

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TRANSLATION.

APARARKA'S COMMENTARY ON YAGNAVALKYA.

(*Continued.*)

Sloka 115.

Shares to Women.

Moreover,

" If he makes the allotments equal, his wives to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions." **115**

" If the father makes an equal division of the wealth on account of the sons, his own[2] wives who have not been given peculiar [3] property (stridhanam) either by the husband (himself) or by the father-in-law, (*i.e.*, his father), should be made partakers of equal shares, with the sons. The meaning is that every one of the wives should be made the possessor of a share equal to the share of a son.

The author [4] speaks of another reason for inequality in division.

1. (1907) I. L. R., 29 A. 985 (F. B.)

1. The Mitakshara, prescribes an equal share to women. If they have peculiar property, half a share is prescribed. Visvarupa includes also the widows of sons and grandsons. He fixes the maximum at 2,000 panams or so much as will be equal to their stridhana.

2. *i.e.*, Separate.

3. Yagnavalkya.

Sloka 115.

Relinquishment of share.

"The separation of one who is able to support himself and is not desirous of participation (may be completed) by giving some trifle."

To the son who on account of his capacity to earn wealth does not wish (to participate in) his father's wealth (or) to one who, though capable of earning wealth, through laziness, does not make efforts conducive to the acquisition and protection of wealth, to him after having given some worthless and trifling wealth, the separation should be effected by the father; otherwise, dispute will arise either with him or his descendants. This (is) with regard to the property acquired jointly by the sons. But in ancestral property, he (the son who is capable of earning and is not desirous of participation, etc) will surely obtain an equal share.

Manu:—"If any one of the brothers has a competence from his own occupation, and wants not the property (of his father), he may be debarred from his own share, some trifle being given him as a consideration."[1]

स्वकादंशाद्भ्रातृभिः (*Swakathamchath Brathrubihi.*) *i.e.* "From their own shares" means from the wealth earned by themselves.

From the context, something else is expressed. Here **Narada**: "He, who, being devoted to family affairs attends to them should be respected by the brothers with food, clothing and conveyance[2]".

Apastamba:—All (brothers) who are devoted to (their sastraic) duty, are participators.[3] He who gives (wastes) wealth contrary to the sastras, though (he be) the eldest, should be made a non-participator.[4]

अधर्मेण (*Adharmena*): contrary to sastras, *i.e.*, by gambling, etc. द्रव्याणि (*Dhravyani*) *i. e.*, wealth like gold, cow, clothes, etc; प्रतिपादयति (*Pratipadayati*) *i.e.*, gives, wastes or otherwise disposes.

Gautama:—"According to some, the son born of a wife of the same caste shall not obtain (a share) if he be living unrighteously."[5]

1. Manu Ch. IX. §. 207.
2. S.B.E., Vol. 33, p 198. Narada, Ch. 13, §. 35.
3. Cf. S. B. E., Vol. 2, p. 135. Apastamba, Ch. 2, §. 14.
4. Cf. S. B. E., Vol. 2, p. 135. Apastamba, Ch 2, § 15.
5. S. B. E., Vol. 2, p. 305. Gautama, Ch. 27, §. 40.

Manu :—" All (those) brothers who are addicted to any vice lose their title to inheritance."[1] Sloka 115.

Relinquishment of share.

Sankha and Likhita :—" To one who has lost his caste (and who is not allowed to eat or drink from a common vessel), wealth, oblations of food and libations of water cease."

अपपात्रितः (*Apapatritaha*) is one who has lost his caste, *i.e.*, one who has been excommunicated by (his) kindred on account of his apostacy.—रिक्थं Riktham (*i.e.*) Father's property : To one who occupies the position of a son, the wealth of the kindred also.

The author says :—Unequal partition has been dealt with. As it is legal, it cannot be disputed.

" To those separated by greater or less shares, (the partition) made by the father is pronounced (by the Smritis) legal."[2] 116.

That (partition) made by the father in respect of wealth earned (either) by the sons (or by himself) is legal with regard to the sons possessing partitioned wealth separated in greater or less shares. That (share) determined (as it is) by the father cannot be disputed.

Brihaspati :—" Those to whom, shares, even or uneven, have been allotted by the father; by them, the shares should be adhered to accordingly ; otherwise, they are liable to be punished";[3]

The author now propounds another method of partition, characterized by its agent, action (the mode of making it) and time.

" The sons should after the death of their parents, equally share the assets. Of the mother's property, the daughters must share what remains after paying (her) debts ; in their absence, (their) descendants." 117.

After the death of the mother and the father, the sons should make an equal division of their assets and liabilities and should each take a share. Therefore, whatever share one takes of the assets, so much also of the liabilities he should take.

1. Manu, Ch. IX, § 214.
2. Cf. Colebrooke:—" A legal distribution made by the father among sons separated by greater or less shares is pronounced valid."
3. S. B. E., Vol. 33, p. 370. Brihaspati, Ch. 25, § 4.

Sloka 115. Partition of mother's wealth.

While thus (making a division) in cases of uneven partition, the proportion in which division has been made by the father himself, *i.e.*, four, three or two, in the same proportion debts also must be divided as in the case of assets.

As for the mother's effects, what remains after discharging her debts, that—her daughters should divide. In the absence of daughters, their descendants, *i.e.*, the daughter's descendants. In the absence of daughters or their descendants, the sons only should divide their mother's property. So says

Katyayana:—"In the absence of daughters, the (mother's) wealth goes to the sons. The wealth given by relatives, in the absence of (those) relatives goes to the husband."

That the sisters who have their husbands alive shall share with their relatives (brothers) has been established as the rule of partition with regard to women's wealth.

Manu.—"On the death of the mother let all the uterine brothers *and* uterine sisters equally divide the maternal estate."[1] The (word) *and* here is used in a disjunctive sense and not in a conjunctive sense. When in a disjunctive sense, maiden daughters take the preference. As **Manu** himself says:

"Property given to the mother on her marriage is inherited by her maiden daughter."[2]

But **Gautama** says that the capacity to take the mother's wealth is with indigent daughters (though given away).

"A woman's wealth to the maiden daughters and to the daughters who are not well to do, *i.e.* अप्रतिष्ठिता."[3]

अप्रतिष्ठिता (*Apratishtita*): means one who is childless or poor or unfortunate.

Brihaspati:—"The wealth of a woman (goes) to her sons. The daughter also shares in it, if a maiden. If married she will get something."[4]

यौतुकं *Yautukam i.e.*, separate property, मानमात्रक (*Manamatrakam*) means 'a little.'

Vasishta:—"A mother's *parinahyam*, woman only should take.

1. Manu, Ch. IX, § 192. 2. Manu, Ch. IX, § 131.
3. S. B. E., Vol. 2, p. 302. Gautama, Ch. 28, § 24.
4. S. B. E., Vol. 33, p. 383. Brihaspati, Ch. 25, § 87.

परिणाह्यं (*parinahyam*) (*i.e.*) jewels, etc. In the case of a childless woman's wealth, Manu says : Sloka 115.

Partition of mother's wealth.

"The wealth given by the father to a woman in any manner, that, the Brahmini girl (step daughter) or her descendants shall take [1]."

"By the father" is only illustrative. Daughter means step-daughter by the qualifying word *Brahmini*. While thus, when the married daughters are well off, even the sons get a right in the mother's wealth. In this matter **Manu** speaks of a peculiarity[2]:—

"Even to the daughters it is fit that something should be given according to their deserts out of the maternal grandmother's property on the score of affection."[3]

The meaning of the verse "The sons should divide the father's wealth after the parents" is :—If they divide after their parents' death, they should divide the wealth, etc., equally. This relates to the partition among the brothers. Therefore, if the brothers divide even during the father's lifetime they should divide only equally. By implication, it follows that this rule does not apply to the partition by the father ; and not that the sons should divide only after the death of the parents.

Manu says :—"They may live united : or by desire of multiplication of religious duties, they may live separated."

By partition religious duties are multiplied. Therefore, partition is laudable. [4]

As to what he himself has said :—

"The eldest son alone may take the father's wealth in its entirety and the others may live under him as they lived under their father.[5] :—

This should be understood where the younger brothers have not finished their Vedic studies or are unfit for a share by reason of lunacy, etc., or have not attained majority. In this matter **Katyayana** (says) :—

"Partition is ordained to those who have attained majority ; and men attain majority in their sixteenth year."

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1. Cf. B. E., Vol. 14, § 89 "Let the daughters divide the nuptial present of their mother" Vasishta Ch. 17, p. 46.

2. Manu, Ch. IX, § 198.

3. Manu, Ch. IX, § 193.

4. Manu, Ch. IX, § III.

5. Manu, Ch. IX, § 105.

Sloka 115.

Partition by brothers.

Non-attainment of majority is illustrative. The non-attainment of Vedic studies is also a cause of non-partition. So says **Harita**:

"They should live united if the younger brothers have not completed their Vedic study."

Narada:—

"The senior brother shall maintain all (the junior brothers) like their father if they wish it; even the youngest, if able, (may do so). The protection of the family depends on one's ability[1] and Narada says that only after discharging the father's debts, his wealth should be partitioned.

"What remains after the father's funeral and after discharging the father's debts shall be divided by the brothers; otherwise the father becomes a debtor." [2].

पितृदाय: *pitrudaya i. e.*, funerals. So says

Gautama: "All the brothers should give (perform) the funerals together."

Katyayana:—"At the time of partition, whatever debts have been incurred by the brothers or the paternal uncle or the mother, *for* the family, should be paid by all. In case of dispute, that debt which is proved by evidence should be discharged by payment to the proper person. Otherwise, not."

विरोधात्परतः *Virodhat parathaha*: After litigation.

To the same effect:

"The debt of one's father, his own debt incurred on account of those of his father and one's own debts [3], must be discharged (*by him*) jointly with his kinsmen, when partition is made."

The meaning of this (is) "That which has been given for *dharma*, and that which has been given away out of affection and that which has been ordered to be discharged (all these if known) should be divided and their discharge shall not be from out of the father's wealth." The meaning is: That which is meant for *dharma* and that which is promised out of affection and that which the son has been ordered by the father (by saying)

1. Cf. S. B. E. Vol. 33 p. 190. Narada, Ch. 13, § 5.
2. S. B. E. Vol. 33 p. 197. Narada, Ch. 1:, § 32.
3. Cf. Colebrooke Vol. II, p. 480, § 372. He qualifies "one's own debts" by the addition "for the support of the family."

that "this should be discharged by you"—(all these) if known should be divided, and not that partition should be made after discharging these from out of the father's wealth.

Sloka 115.

Partition by brothers.

"House, land and quadrupeds that are visible are divisible. If it be suspected that effects are concealed (a discovery by) ordeal [1] is prescribed."

Household utensils, beasts of burden, milch cattle, ornaments and slaves that are visible must be divided; if effects are suspected to be hidden a discovery by Kosa [2] is prescribed by Bhrighu."

Prathyaya is of the Dwija kind. *Kosa* is illustrative of all kinds of *dwija* (ordeal).

Manu :—" Let them never divide the value of a single goat or sheep, or a single beast with uncloven hoofs : a single goat or sheep (remaining after an equal distribution) belongs to the first born[3]

विषम. *Vishama* :—a number over and above the number of the brothers.

S. SRINIVASA AIYAR.

(*To be continued.*)

CRITICAL NOTE.

OBSERVATIONS ON *RAMASAWMY v. MUNIANDI*, *BARBER v.* RAMANA, &c.

In *Barber* v. *Ramana*[4] two points are decided: (1) that a payment made to one of two joint promisees or creditors gives a valid discharge against both, and (2) that such payment furnishes a good defence to a suit by the holder of a simple mortgage. Without distinguishing these two points the Madras High Court has in a recent case questioned this decision, holding apparently that in India joint promisees must be treated as having distinct and separate interests. This opinion, the expression of which, it may be noted, was quite unnecessary in the circumstances of the case, is based partly on the provisions of the Contract Act, partly on the English cases. It is said that S. 45 of the Act lays down an express rule in the matter and that S. 38, which seems to indicate a different rule, does not really do so. The

1. See Colebrooke, II p. 292.
2. See Colebrooke, II p. 29. 'Kosa' is an ordeal by touching water in which a principal idol has been washed.
3. Manu, Ch. IX, § 119.
4. (1897) I. L. R. 20 M. 461.

material words in S. 45 are as follows:—"When a person has made a promise to two persons jointly, then * * * the right to claim performance rests * * * with these during their joint-lives." These words clearly mean that proceedings to enforce the performance of the promise must be taken in the names of both the promisees. That is the natural and obvious meaning of the words. How they can, in addition, be made to mean that the two persons described as joint promisees are not joint promisees or that 'joint' means 'several,' is difficult to understand. It must be remembered that two persons cannot be at the same time joint and several promisees. So far from regarding joint-promisees as several, the section really emphasizes the distinction, for in effect it says "two joint-promisees must join in suing, whereas one who has a separate interest need not join the other." Then it is said, that S. 38 has little or no bearing on the question, because it relates to tender or offer to perform, and an offer of performance is not a discharge of the obligation. The section declares that the effect of an unaccepted offer is that the promisor is not responsible for non-performance. The promisor who has undertaken to supply certain goods at a certain place and time and who has made a proper tender, has done all that he is bound to do. The obligation is at an end ; he is not bound to deliver the goods; unless some payment has been made to him in advance he is discharged. And even in the case of money lent there is, on tender being made and refused, a partial discharge ; the debtor from the date of tender ceases to be liable for interest. This being so and a tender made to one joint promisee having the same legal consequences as a tender to all of them, how can it consistently be held that a similar tender which is not refused is, except as regards the individual to whom it is made, altogether ineffectual ? But there is another section of the Act bearing on the question. Bailment is a contract ; the bailee's contract is to deliver the goods bailed to the bailor or according to his directions. Section 165 provides for the case of joint-bailors and declares that the bailee may deliver the goods back to one of them without the consent of all. That is to say, his contract is duly performed and he is discharged from all liability by such delivery. Dealing with the

argument founded on this section the court quotes the opinion of Dr. Whitley Stokes to the effect that the section is not in accord with English law and goes on to observe that the special rule thereby enacted has not the force of a general principle of the law of contracts. The reference to Dr. Stokes' criticism is unfortunate, because an examination of the cases cited fails to show any departure from English law. Two propositions may be deduced from them, the first being that, on a bailment by *A* and *B* (joint owners) made to *C*, *A* and *B* must join in making a demand, and the second, that a re-delivery of the goods to *A* alone is permissible and operates to discharge *C* from all liability in respect of the bailment. These two propositions are embodied in the first sentence of S. 45 and S. 165 taken together. S. 165 agrees with the English cases and is in complete harmony with S. 38, whereas, according to the construction adopted by the Madras judges, S. 165 is anomalous and Ss. 45 and 38 do not harmonize with each other. We come now to the English cases bearing on S. 38. Nobody denies that the section is founded on *Wallace* v *Kelsall*[1] or at any rate on the rule there laid down. Nor is it suggested that any doubt had been thrown on the authority of that case at the date when the Contract Act became law.* It is not pretended that in any reported case or text-book prior to 1872 the consequences of the equitable presumption were explicitly stated as they are in *Steeds* v. *Steeds*[2] and *Powell* v. *Brodhurst*.[3] Of course it is not meant that any new doctrine was invented in 1889, still less that the equitable presumption in favour of tenancy in common had not been recognized before 1872. But what one has to look to in construing a codifying Act like the Contract Act is the law as stated in the books at the date when the Act was framed. To suppose that the framers of the Act had in mind the ruling in *Steeds* v. *Steeds*[2] involves an anachronism. Moreover, if that ruling had been before them and they had been minded to give effect to it, assuredly S. 38 would not have appeared in the form it now presents. For these reasons it is contended that any such alteration of the rule in *Wallace* v. *Kelsall*[1] as is supposed to have taken place would be immaterial.

*In 1874 the Bombay Court followed the English law but no reference was made to the Act—*Krishnarow* v. *Manoji* : 11 Bom. H. C.R. p. 106.

1. (1840) 56 R.R. 307. 2. (1882) 22 Q.B.D. 537.
3. (1901) 2 Ch. 160.

But it is not quite correct to say that the authority of that case has been 'qualified' or 'weakened' (see *Jagat Tarini* v. *Narba*[1]) by *Steeds* v. *Steeds*[2] or *Powell* v. *Brodhurst*[3]. On the contrary it is expressly stated in the judgment in the latter case that *Wallace* v. *Kelsall*[4] remains good law and that in an action for debt the plea of payment to one joint-creditor is still a good plea. It is only in matters in which, as in *Steeds* v. *Steeds*[2] and *Powell* v. *Brodhurst*[3], the equitable jurisdiction of the court is invoked that the equitable presumption in favour of tenancy in common prevails. In *Ramsawmy* v. *Muniandi*[5] no attention seems to have been paid to this distinction. Perhaps as it was a mortgage suit the court conceived that it was exercising equitable jurisdiction; but they did not say so, and from the judgment it would seem that in any case, even in a simple action for money, they considered that the plea of payment to one joint-creditor must be bad.

If this is what the judgment means, the result is this, that whereas in England the common law rule is in certain cases qualified, not abrogated, by a rebuttable presumption, in India the common law rule has ceased to prevail and it is only by special agreement between the parties that a rule similar in effect to that rule can become applicable.

According to this view it is altogether out of place to refer to the equitable presumption and the common law rule. Both the rule and the presumption have been swept away and a new rule substituted.

If the judgment does not mean what has been suggested, different considerations arise. If the common law rule still survives, the question to be considered in future cases will be whether in the particular circumstances equitable relief is being sought.

Barber v. *Ramana*[6] has had an unfortunate fate. The question involved, whether there rightly decided or not, has never been seriously discussed in a case in which the point had necessarily to be decided. It has received only the perfunctory examination which judges are wont to apply to matters on which their opinion is not really required. When the question does arise for

1. (1907) I.L.R. 34 C. 305.
2. (1882) 22 Q.B.D. 537.
3. (1901) 2 Ch. 160.
4. (1840) 56 R. R. 307.
5. (1910) 20 M.L.J. 709.
6. (1897) I. L. R. 20 M. 461.

decision it is to be hoped that the judgment will be put on definite grounds, explaining exactly with reference to the sections of the Contract Act, what has become of the common law rule; how far (if at all) the equitable presumption prevails; what rule (if any) has been substituted; and, finally, on what authority such new rule is founded.

H. H. SHEPHARD, M. A.

NOTES OF INDIAN CASES.

Coopoosami Chetty *v.* Duraisami Chetty.—I. L. R. 33 M. 67—It is difficult to accept in their entirety the remarks of the learned Judges in this case. It might be that the learned judge who tried the case in the court of first instance was wrong in dismissing the suit without taking evidence. It may also be that the decided cases establish that it is *prima facie* defamatory to call one an out-caste. While this may be so, we cannot agree that a member of a caste is not entitled to insist upon persons associating with him to conform to certain requisites. That of course raises a question of privilege which has to be proved by the person pleading it. In fact the learned judges admit this in so many terms when they observe as follows: "The judge is, of course, right in holding that it is open to the defendants to refuse to associate with the plaintiff, on account of what they consider to be a breach of any caste rule. In fact they might do so without being called upon by the courts to give any reason." It cannot, however, be that, when the person or persons assign a reason when called upon, that they commit any wrong *per se*, and if the learned judges be taken to have accepted the view it may be difficult to agree with them. However, it is clear that the trial judge was wrong in rejecting the plaint as disclosing no cause of action. Upon the statement of plaintiff a cause of action is disclosed which it is for the defendants to meet and that can only be after taking evidence.

Kaliappan Servaikaran *v.* Vardarajulu.— I.L.R. 33 M. 75—The decision in this case seems to be somewhat contrary to the principle of the decision laid down in *Ramaswami Chetty* v. *Oppilamani Chetty*[1] already noticed by us. The latter was a

1. (1909) I. L. R. 33 M. 6.

case of a decree obtained against *A* being executed after *A*'s death against a person claiming to be *A*'s representative though really not so. The present case under notice is one where the suit was brought after the debtor's death against a person whom the creditor believed to be the legal representative and who but for the will in law would have been a legal representative. The decision in *Kadir Mohideen Marakayar* v. *N. V. Muthukrishna Ayyar*[1] is distinguishable upon the ground that in that case the suit was brought against the debtor himself and the latter died pending suit. It was observed by *Benson* and *Bhashyam Aiyangar* JJ. at p. 235 of the report in the case: "It is unnecessary to consider and reconcile the cases referred to in the judgment of the lower courts, which, with a few additional cases, were also cited in the argument before us. With the exception perhaps of *The General Manager of Durbhanga* v. *Maharaj Coomar Ramput Singh*[2] they are all cases in which the debtor died before the suit and the suit was brought against only one or two of his representatives excluding the others or against a person who was not the true representative, and not as here, in which the suit was brought against the debtor himself." The case of *Subbanna* v. *Venkatakrishnama*[3] relied upon by the learned judges is, however, not on all fours with the case under notice. In that case a decree was obtained against a widow ignoring the existence of an adopted son. The widow was of course sued as representing her husband's estate but that decree was not sought to be executed by the decree-holder but the latter brought a suit against the adopted son for a declaration that the decree against the widow was binding upon him. It was held that the decree was not binding. How a suit was maintainable under the circumstances so brought by the plaintiff it is hard to see. The question of effectual representation is important to all classes of suitors and it is hoped that a definite pronouncement under the rule-making power of the High Court will be made. As it is there is a hopeless conflict of authorities upon the question.

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1. (1902) I. L. R. 26 M. 230. 2. (1872) 14 M I. A. 605.
3. (1888) I. L. R. 11 M. 408.

SUMMARY OF ENGLISH CASES.

In re Watkin's Settlement: Wills v. Spence.

[1911] 1 Ch. 1 (C. A.)

"Subject to"—Words creating a charge on the corpus.

Where property was conveyed to trustees upon trust to pay an annuity out of the income of the trust premises and subject thereto upon certain trusts over: *Held*: The effect of the words "subject thereto" was to make the annuity a charge on the corpus and not leave it merely a charge on the income as the previous words would suggest.

Clouth v. Story: [1911] 1 Ch. 19 (C. A.)

Fraudulent appointments—Power to appoint to legal estate and equitable estate—Carrying over to separate account, effect of—Compromise, extent of operation of.

In this case, *Farwell* L. J. delivering the judgment of the Court of Appeal, points out the distinction between appointments in fraud of a power when the power is to appoint to a legal estate and when the power is only to appoint to an equitable estate. In the former case, the appointment is voidable and a *bona-fide* purchaser for value without notice from the appointee is protected. In the latter case, the appointment is wholly void and the purchaser takes nothing. But if effect is given to such appointment by the trustees transferring the funds, to the assignee, (here a mortgagee), the latter would have obtained the full legal title, and restitution can no longer be had against him. But a mere carrying over the funds to the assignees' account in an administration action does not have such effect. So long as the money has not been paid out the court has control over it and can rectify any error that has induced such a transfer.

A necessary consequence of the distinction above pointed out is that while the one is capable of being ratified by parties entitled in default of appointment, the other is not.

Another point arose in the case, *viz.*, as to whether a compromise between the parties in the suit (by the mortgagee for administration of the trust funds) before they had any notice of

the facts vitiating the appointment estopped the
tioning it. On this point, this is what his Lordshiṛ
not in accordance with principle or authority to
of compromise of ascertained specific questions so
any party thereto of any right not then in disp
contemplation by any parties to such a deed."

In re **Cohen: Brookes v. Cohen.** [1911]

Appointment in fraud of the power—Condition-
for a purpose foreign to the power.

In this case, the donee of a special power
favour of his wife and children, appointed an ann
in favour of his wife and also directed that a fı
should be paid to her, if she should pay his debts.
was whether the grant of the additional annu
Held that such a conditional appointment for a
neous to the power was a fraud upon the power an

Mosely *v.* Koffyfontein Mines, Limited. [

Action to restrain wrongful issue of shai
Authority to represent company—Past acts and fu
between.

The plaintiff in this case suing on behalf of l
other share-holders sought to restrain an inten
very large number of shares, which according tc
the company had no authority to issue. To this
objection was taken on the ground that as he hi
tor, was a moving party to the passing of the reso
ing the issue and had also accepted shares allotted
issue, was estopped from contending that the co
authority to issue fresh shares. *Held* that in thi
was a distinction between a case where the acti
of what has been done in the past and where it
strain a wrong doing in the future. In the forme
be estopped : in the latter, he would not be.
person is suing on behalf of a company to enforc
he says the company is wrongfully abstaining fro

a shortening of the Long Vacation. The annual meeting is the only opportunity given to the Bar to express its opinion in its corporate capacity on matters affecting the administration of justice, and it is not to be forgotten that the Chairman of the Bar Council, when questioned on this subject by the Joint Committee last year, expressed his inability to state the views of the branch of the profession which he represented because there had been no recent attempt to formulate them at any of these meetings. Solicitors have not been so lax in their attention to the subject, and the records of the Law Society show that for the last twenty years and upwards there have been continuous and repeated demands, both by the Council and the general body at its annual meetings, for a reduction in the length of the Vacation. The Judges also have, or ought to have, under the provisions of the Judicature Act, 1873 (S. 75), their annual assembly at which matters of this kind are to be considered, and S. 27 of the Act expressly provides for the modification by Order in Council of the existing Orders regulating vacations 'upon any report or recommendation of the Council of Judges of the Supreme Court, with the consent of the Lord Chancellor.' Here again there seems to have been a lack of effort to formulate opinion on this subject, for the Lord Chief Justice, in his evidence before the Joint Committee, was unable to give any indication of the views of the Judges jointly, though he intimated his own willingness to consider favourably such a reform. There is no doubt as to the public demand, which has been sharpened and intensified by the discussions in Parliament on the Bill for the appointment of additional judges, and the Lord Chancellor and the law Officers of the Crown—who together constitute before the people our equivalent to a Ministry of Justice—stand pledged to carry through as speedily as possible all the urgent reforms referred to in the recommendations of the Joint Committee. There is none more urgent than this of such a shortening of the Long Vacation as will bring the sittings of the Court more nearly into relation with the business habits and wants of the community. The rank and file of the Bar, whose interests are no less directly involved, can, and ought to, make a definite pronouncement of their wishes in the matter at the forthcoming meeting, and, failing any initiative on the part of

the Council in their report, it is to be hoped that a formal motion will be set down by some unofficial member of the Bar on which a resolution may be come to at the meeting.—*The Law Journal.*

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Lawyers as Lawmakers.—'Is it wise,' asks Herbert Spencer in his essay on representative government, 'to depute lawyers to frame the laws which they will be concerned to carry out, and the carrying out of which must affect their private incomes?' A military gentleman, who proudly adds 'Lieutenant-Colonel' after his name, in a communication he has addressed to one of our contemporaries, shares, perhaps all unconsciously, Herbert Spencer's prejudice against the legal element in the House of Commons. He suggests 'a strict limit of the number of lawyers that shall at any one time hold seats in the House of Commons,' and alleges that 'it is generally and conscientiously admitted that at present the legal profession is absurdly represented in our Lower Chamber.' It does not appear to have occurred to the mind of the gallant gentleman that the lawyers who are returned to the House of Commons represent the constituencies who elect them and not the profession to which they happen to belong. Nor does he condescend to explain how, if the constituencies are so impervious to military criticism of political lawyers as to return more lawyers than the suggested limit, the surplus number are to be got rid of. If, for instance, the number of lawyers in the House of Commons were fixed at fifty, and the constituencies returned one hundred, who would determine which of the elected lawyers should resign their seats? It would have been simpler for the 'Lieutenant-Colonel' to have repeated the suggestion, which every now and again is timidly put forward by less gallant persons, that practising lawyers should be wholly excluded from the House of Commons. This proposal is scarcely likely to receive much attention in the Legislature while the present Government—the Government of all the lawyers—is in office. If ever it should be seriously brought forward it could not be better resisted than in the words used by Whitelocke when such a proposal was made in Cromwell's time: 'With respect to the proposal for compelling lawyers to suspend their practice while they sit in Parliament,' he said, 'I only insist that in the Act for that purpose it be provided that merchants should

forbear their trading, physicians from visiting their patients, and county gentlemen from selling their corn and wool while they are members of this House.' And Whitelocke, the Lieutenant-Colonel' may be interested to learn, was a soldier as well as a lawyer:—*The Law Journal.*

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Imprisonment for Debt.—His Honour Judge Amphlett, K.C at the Birmingham County Court on Wednesday, said the court over which he presided was the largest, so far as the volume of business was concerned, in the kingdom. If the Greater Birmingham scheme should come into operation during the year, the area of jurisdiction of the court would be largely extended. The return of judgment summonses for 1909 showed that 9,611 summonses were heard in that court and at Solihull, and in 6,757 cases orders of commitment were made in default of payment of fixed monthly instalments. Out of that number warrants were issued in 3,036 cases, and no fewer than 657 debtors were arrested and imprisoned. Out of these unfortunate debtors who found their way to prison in 1909 no fewer than 567 paid themselves out almost as soon as they got there, and only 90 out of 657 served the full term of imprisonment—21 days. His jurisdiction under the Debtors' Act was, he did not hesitate to say, thoroughly loathsome work, and he only wished it were possible to relieve a County Court Judge from those very irksome and degrading duties. His Honour mentioned that he had paid a visit to Winson Green Gaol with the idea of ascertaining what were the exact conditions under which some of the unfortunate debtors had come to be arrested, and he was greatly surprised and gratified to find only one County Court debtor in prison. In future no orders for committal would be sanctioned by the court in the case of any married man having children dependent upon him who did not earn at regular work at least 20s. a week. He did not understand the principle on which the tax-payer was made to bear the expense of maintaining the defaulters while in prison. Whether it ought to be continued was a matter for the Legislature and not for him to determine. To abolish it would be to put an end once and for all to the credit system, which, as now carried on, involved in mis-

fortune and permanent insolvency so many thousands of the working classes. He could only express an earnest wish that the new Parliament might be able to devote some of its time to the recommendation of the Select Committee:—*The Law Journal.*

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Judges and their Pensions.—Mr. Justice Grantham, who bears his seventy-five years very lightly, is to be congratulated upon having completed his twenty-fifth year on the Bench. Though no occupant of the Bench has been the subject of more criticism, there is none, despite the impulsiveness which has often made him overstep the lines of judicial utterance, for whom the Bar entertains a more kindly feeling. More than ten years have now elapsed since "the Father of the Bench" became entitled to retire on a pension, but he continues to perform his duties with a vigour and light-heartedness which afford not the slightest sign of any desire to avail himself of the generous allowance which a grateful country has provided for him. Judicial work would appear, indeed, to have a strong fascination for those privileged to engage in it, for the instances are remarkably few of judges in the enjoyment of good health retiring immediately on their completion of fifteen years of service. There are five judges—Lord Macnaghten, Lord Justice Vaughan Williams, Lord Justice Kennedy, Mr. Justice Grantham, and Mr. Justice Lawrance—who have long since become entitled to retiring allowances. The number will be increased next year, when four other King's Bench Judges—Mr. Justice Ridley, Mr. Justice Darling, Mr. Justice Channell, and Mr. Justice Phillimore—will complete the qualifying period of service. Whether judges should be compelled to retire after serving fifteen years is a nice question, which at the present moment cannot, perhaps, be decided without reference to the names of some of these members of the Bench:—*Ibid.*

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Barristers' Fees.—'A Conveyancing Counsel of Twenty-five Years Standing,' writes to the *Pall Mall Gazette.*—'Your correspondent, W.W. Carter, rightly amazed at the statement that there are 13,000 barristers, and only about 300 employed, says there are thousands of people who would like to consult counsel for a moderate fee, but cannot gain direct access to him, and asks why he

cannot consult a barrister in the same way as a medical specialist, who will give him full advice for a fee of two guineas. Permit me to point out that, even under the existing practice, if your correspondent or anyone else has any point of law he desires advice about, and can state his point within the limits of half an hour, there is scarcely a barrister of standing at the Bar, outside the ranks of King's Counsel, to whom he could not obtain access for an expenditure of two guineas or less. There are plenty of solicitors with whom he could arrange to accompany him to the chambers of any barrister he chooses to name for half an hour's conference for an inclusive payment of two guineas. The barrister's fee for half an hour's conference is one guinea, and five shillings for his clerk—total 1 *l.* 6*s.* But the truth is that, so far at least as the law of property is concerned, a layman's point of law cannot usually be satisfactorily disposed of in this way. His point of law is probably not a neat point—it is probably a mixed point of law and fact, or it is not the point on which his case depends. As an eminent judge once put it in a certain case: "The first point to decide is, What is the point which we have to decide?" The real point can usually only be discovered by the perusal of lengthy and complex documents, of which no copies are available, and the mastery of which would probably take a whole morning. However, no lawyer will deny that there are neat points, even of property law, which might be usefully disposed of at a conference with the client in person. But, owing to the jealousy of solicitors, and to the fortunes of counsel being entirely in their hands, it is impossible for any counsel with any practice to lose to venture to see clients without the intervention of a solicitor. I may add that the statement that only about 300 barristers out of 13,000 are employed is an obvious error; 3,000 would be nearer the mark. I could name 300 fully employed barristers in Lincoln's Inn alone.' :—*The Law Journal.*

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The Shortening of the Long Vacation.—As the Attorney-General declared at the end of the proceedings on Wednesday, the profession generally is indebted to Sir Edward Clarke for having elicited the opinion of the Bar—so far as the vote of a substantial majority in an assemblage of a few hundred member

can be said to show it—on the question of a reduction in the length of the Long Vacation. Sir Edward Clarke is the *doyen* of the English Bar, and his arguments in favour of the change which, as he reminded the meeting, he advocated eleven years ago, at another Bar meeting, were listened to with respect. But it was clear from an early stage of the proceedings that those who had come to Lincoln's Inn Old Hall in such unwonted numbers, were not favourably inclined to any proposals for a shortening of the established holidays, and even the very moderate reform of a limitation of the vacation to a full two months' was rejected. The opposition was led by exceptionally busy juniors like Mr. Boydell Houghton, of the Common Law Bar, and Mr. Austen Cartmell, of the Chancery Bar. But what of the rank and file—the men who, as Sir Edward Clarke said, have to depend on their business in the courts as their sole means of subsistence and advancement, and who are forced to go on with holidays when it is work they want—what of the solicitors, who have demanded the reform for twenty years past, and what of the public? The claim which in the recent Parliamentary debates Sir Edward Carson made on behalf of the public against the standing grievance of closed courts for long intervals in the year, when justice is allowed to sleep, while all other activities of the community are at work, is likely to be still further pressed in Parliament; and that, we opine, none the less energetically because this meeting of the Bar has declared against any reduction in the annual lawyers' holiday, or because the judges, by the refusal of Sir Edward Clarke's motion, are almost precluded from making the recommendation which the statute requires should proceed from them before any shortening of the vacation by merely administrative act.

THE QUESTION OF THE LONG VACATION AT THE ANNUAL BAR MEETING.

SIR EDWARD CLARKE, K. C., moved 'That in the opinion of the Bar a shortening of the Long Vacation, by which it would begin on August 1 and end on September 30, would be in the interest of the profession as well as of the public.' It was nearly eleven years ago, he said, since he seconded a resolution in similar terms which was moved at the annual meeting by Mr. Reginald Brown. A resolution in favour of Long Vaca-

tion beginning on August I was carried, and he was very glad to say it had since been carried into effect, and he thought there was now again reason for suggesting that the Vacation should be shortened. Very recently, in consequence of the accumulation of arrears in the King's Bench Division, an inquiry was held as to the means which could best be taken for remedying that mischief, and at that inquiry the Chairman of the Bar Council was called upon to give evidence. One of the amendments proposed was the shortening of the Long Vacation, and upon being asked a question the Chairman of the Bar Council was obliged to say that he had no authority to answer that question, inasmuch as the Bar had not expressed its opinion upon the subject. The result of that inquiry was, as they knew, that two temporary Judges were appointed. He said temporary Judges because the Act of Parliament provided that the two vacancies should not be filled up unless necessity existed, but he had no doubt whatever that the increase would prove to be permanent, because an increase in the number of the judges, if it resulted in the more speedy and effective administration of justice, would at once quicken the stream of litigation, and he had not the slightest doubt that sufficient occupation would be found for the two new judges, as well as for their brethren, whatever arrangement might be made as to the Long Vacation. But he thought it desirable that the Bar should have an opportunity of expressing its opinion on the subject at a gathering of this kind, considering that the object of the founders of the Bar Council—of whom he was one—was that the Bar should have an opportunity of expressing its opinion on all matters affecting its interests. He thought it undesirable that the Chairman of the Bar Council should be obliged to confess that the opinion of the Bar had not been expressed upon such a subject. Therefore, he had put this motion upon the paper, and he hoped it might be adopted, because the result of it, he thought, would be to help very much in the satisfactory administration of justice. That there should be a Long Vacation, of course was quite admitted, but let it be remembered what part the administration of justice played or ought to play in the organisation of civilised community. The administration of justice was a necessary accompaniment and complement of a great commercial and industrial system. There

must be questions arising, quite honestly and fairly arising, between traders and persons engaged in business which ought to be very promptly dealt with. It was also important that the administration of justice should keep pace with the commerical and industrial work of the community, and if at a particular time of the year, and for a very long time, the administration of justice was impeded, the commerical life of the country was very seriously interfered with, and also the prosperity and the welfare of the profession itself. He had said that there must be a Long Vacation, but it must be remembered that 90 per cent. at least of the hard workers of the world had no holidays at all, except a few occasional days in the year and except the seventh day of rest which the needs of mankind long ago suggested and which the religions of the world had sanctioned. But apart from the Sundays and a few odd days in the year, nine out of ten of the workers of this country had no holidays at all. A comparatively small minority of persons were able to have holidays to restore their health from time to time, but none to the extent to which their branch of the legal profession had hitherto declared its claim. Let them admit the admission in their own favour, which might possibly be challenged by some who were engaged in other forms of work, that the profession to which they belonged had special claims by reason of the heavy burden, the physical and mental strain, which was imposed upon them by their work. But let them see, too, what the present state of things was with regard to holidays. If they looked down the calendar for the present year, they would find that there were fifty three Sundays in the year, leaving 312 working days. It would be found that, according to the present arrangements for the sittings of the courts, 96 days were holidays, leaving 226 days for work. Those 226 days included 35 Saturdays, with regard to which, by a most wholesome practice, which he hoped would not be interfered with, it was considered that in some courts there should be no sitting, and in others that it should be very light. The result was that during the year the members of the profession got a very large number of days of rest. That was not a reason for saying that they should not have at some time of the year a substantial and continuous holiday, and that continuous holiday he desired to keep to the extent of the two

months of August and September. These two months were absolutely sufficient for any possible requirements of health and strength. Eleven years ago he said in that hall—and he had often repeated the statement privately, and had never yet found any one who challenged the truth of the words—"There is no man, however hardly worked in any profession, who cannot get in six weeks of a well-spent holiday the advantage in rest and refreshment to body and mind that a holiday can give. After six weeks, though you may continue to enjoy the rest, the holiday has done all the work that it can for a man in the matter of refreshment of health and of strength." He based that statement upon a long experience, which had been the experience of a life which at some time or other had had a good deal of work to do. Basing himself upon that experience, he asserted that that was indisputably true, and during the eleven years which had passed since he said it in that hall he had often put it to people privately, and he had never met any one who would venture to contradict it. The six weeks went through August and September, and there was the opportunity for a few days spent in arrangements after the sittings of the courts had ceased, and there was also the opportunity for a week of preparation before the new sittings commenced, and so there were six clear weeks.

TWO CLASSES OF OPPOSITION.

There were two classes who were opposed to the proposed change. There were leaders of the Bar, who were highly paid, and who enjoyed long holidays because they could afford them easily. Then there were a good many young men at the Bar whose private means were sufficient to make them prefer the holidays to the sittings, and who for that reason were never likely to become influential or conspicuous in the profession. But the majority of the working members of the Bar were men who made, by the constant and inconspicuous pursuit of their profession, incomes which had to be earned week by week, and to them, when they had had the holiday they required for the restoration of their physical and mental strength, it was a great hardship that they should have to go on spending their time in expensive holidays instead of coming back to do their work. A holiday meant that the income ceased and the expenses were

doubled, and it was a hardship to a man who was working his way in his profession and earning a moderate income that he should be interfered with in this way. Under the present conditions, especially owing to the absurd practice of a judge taking down with his own hands the evidence which was given, the judges' work was more laborious and trying than that of anyone else, except in the case of a few number of members of the Bar in highly responsible positions. But the judges could take care of themselves. There were enough of them to arrange that their holidays should be taken for such time and at such time as would best relieve them of the pressure of work. As to the other branch of the profession, the solicitors had been urging that the Long Vacation should begin on August 1 and end on September 30 for nearly 30 years, and there was no question, he believed, as to the opinion of that branch of the profession. He hoped that the meeting would support the motion. He believed it would be a great advantage to the working members of the profession, and he was sure it would be a great advantage to the public at large.

Mr. T. P. BLACKWELL had given notice to move 'That the Long Vacation should commence on August I and terminate on September 30 and that pleadings may be amended, delivered and filed in the Long Vacation on and after September 21. in any year.'

SIR EDWARD CLARKE accepted the suggestion that the additional words in Mr. Blackwell's motion should be added to his own, and Mr. Blackwell thereupon seconded Sir Edward Clarke's motion.

Mr. BOYDELL HOUGHTON, in opposing the resolution, said he held a strong opinion that the change that was proposed was not in the interest of the profession or in the interest of the public. If he thought it were in the interest of the public, he should take a different view, because he had long held the view that had been expressed by the Attorney-General that in any case where there was a conflict between the interest of the Bar and the interest of the public—there were not many—the interest of the puplic must prevail. In this case he thought there was no conflict. It was to the interest of everyone that they should have their cases tried without any delay, and there had been

until quite recently a very real grievance so far as delay was concerned. So strongly was it felt by the Bar that on more than one occasion the matter was brought before the Bar Council. It would be remembered that they were indebted to the late Attorney-General and to the present Attorney-General for coming to the meeting of the Bar and supporting resolutions against delay and proposing remedies, and he thought they were largely indebted to them for having at last got two additional judges appointed. What was the present state of things? Of course, the delay must be dealt with, and if the appointment of the two additional judges did not remedy it they would have to seek some further remedies, whether in the appointment of more judges or not he would not express an opinion. But no case was made out at present for taking the course proposed by Sir Edward Clarke. Their own remedy had been adopted by the Legislature, and it was now proposed that within four months of the adoption of the remedy they were to ask for some new remedy, a remedy for a disease which they firmly believed, in the course of a month or two, would become non-existent. He thought, therefore, that the motion was not in the interest of the public. How was it in the interest of the Bar? Could it be said that the addition of 12 days to the working days of the Courts was in the interest of the Bar? There were, he knew, some who not unnaturally thought that if the holidays were shortened it would have the effect of making the busier men at the Bar say they would not come back to town until a fortnight after the sitting of the courts had begun, and that the result would be that there would be a greater opportunity for the younger members of the Bar. But if the vacation were shortened it would become impossible for any man in substantial practice, not only a very busy man, whether silk or junior, but any man with anything approaching a business, of being away at the beginning of the sittings. As to the younger men, they knew how progress was made from the bottom upwards at the junior Bar. There were many of those to whom Sir Edward Clarke had referred with quite unaccustomed satire, men who were fairly well off and did not at first get much work, who eventually made their mark in the profession. There were others who had to work every moment. How were they going

to be benefitted by taking 12 days off the holidays? Where did the members of the junior Bar generally begin? They had to begin at the bottom, and of them a great many, principally on the Common Law side, went to the County Courts. The man who began to get a little County Court practice must be ready to go to a County Court when the work came, and it must not be forgotten that the County Courts sat throughout the year with only one month's holiday, and many members of the junior Bar had to stop in town in August because one County Court judge in London took his holiday in August while another, also in London, took his holiday in September. Thus practitioners in the County Courts got very little holiday. With regard to the opinion of the Law Society, he would like to repeat what a leading member of a very eminent firm of solicitors in London had told him some few years ago when the question of the Long Vacation was under discussion. The solicitor smiled when he (Mr. Boydell Houghton) remarked that they were always told that the Law Society was desirous of shortening the Long Vacation. 'We have constitutents,' he said. 'The country solicitors come up to town in October for a little change, and they outvote us, and we have to accept their verdict. But we trust to the Bar to protect us.' He would not move an amendment, but he should like to remind the meeting that one of the objects of the Bar Council was that the Bar should choose from among their number gentlemen to represent every kind of practice from the highest to the lowest to serve on the Council, and he felt bound to say that it was to him a subject of regret that a very important matter of this kind should not have been submitted to the Council itself before it was brought before the meeting.

THE OPINION OF THE CHANCERY BAR.

MR. AUSTEN CARTMEL, who proposed the motion as a member of the Chancery Bar, wished to support in every way what had fallen from Mr. Boydell Houghton. He also desired to associate himself with the regret that he had expressed in differing from one for whom they all had so much admiration and respect as their friend, Sir Edward Clarke. He quite agreed that if it was in the interest of the public that the Long Vacation should be shortened by 12 days the private interests of members of the profession whould have to yield. But in his opinion, so far as

the Chancery work was concerned, the interest of the public did not require that the Long Vacation should be shortened as suggested. At the present time the Chancery Courts were well up with their work. It might, of course, be said that if there were more working time less judges would be required. There were now six Chancery judges, one having been added a few years ago. But it was self-evident—that 12 more working days would not enable five judges to do the work that was now done by six. With regard to the interests of the Bar, he understood that what was meant was, first, that there would be a greater volume of of work for the profession; secondly, that the work would be more widely distributed. On the question as to whether there would be a greater volume of work, he doubted whether that would be the case. He did not think that the addition of 12 practising days would increase the volume of work the Chancery Bar had to deal with, and if there was an increase of work he did not see how it would be more widely distributed. Indeed, if it was to affect them at all, it would affect them adversely, so far as the younger members of the profession were concerned. The Long Vacation was really the young practitioner's opportunity as far as Chancery work was concerned, and if it were shortened it would really be shortening the period during which he got his opportunities. It would simply bring back the older members of the Bar 12 days earlier.

The motion was rejected by a large majority, some fifty members voting for it, and about 200 against.

MR. HERBERT BENTWICH said this was a large meeting, but he thought it only represented a tithe of those interested in the subject. He desired to know whether there were any means of taking a poll of the Bar. This seemed to be an appropriate occasion for the application of the referendum.

No answer to the question was forthcoming.

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Twins as Single Persons.—An amusing dispute is reported to have arisen at a London railway station on the question whether the twin sisters, said to be joined together like the celebrated Siamese twins, were entitled to travel with one ticket. The general rule, no doubt, is 'one person, one ticket,' and the ladies, having separate organisms and each being no doubt

endowed with a will of her own, are, we suppose, two distinct legal personalities. Yet on equitable principles, one might argue that the fare which they ought to pay should depend on the accommodation provided for them. If they travelled in a carriage so divided that they would only occupy a single seat, such as an old-fashioned first-class railway carriage or a car on the 'tube,' or if they engaged a berth in a sleeping compartment, it would be contrary to natural justice to charge them as two persons. But their position, if they took a long sea voyage, would be anomalous. They could only occupy one bunk, but presumably they would eat as two persons. The case would be one for a compromise or special arrangement; neither a single nor a double fare would be fair to all parties concerned.—*The Law Journal.*

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The Savarkar Case.—For the fourth time within a year the Indian student, Vinayak Savarkar, has been before a British court, and the charge against him of sedition and waging war against the King, has at last been fully investigated. His fate, indeed, is still undecided, as it depends upon the finding of the International Court of Arbitration, which is to meet at the Hague in the middle of next month, as to whether on his way out to India he had obtained an asylum in France by his accidental escape for a few minutes from English custody. But of his guilt there cannot be a doubt. The Special Tribunal of the Bombay High Court appointed to try those accused of complicity in the Nasik conspiracy, have found him guilty not only of conducting a virulent campaign of incendiary speeches and seditious writings, but of having exported arms from England to India with the purpose of stirring up war against the Emperor's government. It was made quite clear that he had been the prime organiser of the violent anarchical movement which led to the murder of the English Collector at Nasik. Our Government is not in the habit of dealing very severely with agitators, however disloyal their professions, so long as their activity is confined to words spoken or written. But when they pass on to the incitement of the most criminal action and threaten the general peace they become a source of danger which must be repressed, if necessary, by the strictest measures. And it will be lamentable if the right of asylum can be successfully established for such a criminal so as

to set him free to continue his wild agitation under the protection of a foreign residence. Recent events in England have compelled our attention to the existence of a class of refugees who menace the security of the community. The problem of the anarchist cannot be dealt with by national legislation; it requires the co-operation of all the Powers. And if, as we hope, the Powers send representatives to confer upon the treatment of these enemies of all society, they may see their way to restrict the right of asylum of those who, while the enemies only of a single Government, incite to measures which strike at the root of civillisation itself: —*The Law Journal.*

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Dinner to the New Attorney-General.—MR. ARTHUR COHEN, in proposing the health of Sir Rufus Isaacs, said they felt proud of the first member of the Jewish faith who had attained the highest position which an English barrister could hold, the position of Attorney-General of England—the leader of the English Bar. It was fit and proper that as Maccabæans, they delight in his success, for never was a fight more bravely fought than that which had been waged by Sir Rufus Issacs. Never had obstacles and difficulties by no means slight been overcome with such unfaltering courage, and never had any one achieved so rapaid and complete a success. Mr. James Bryce, in a short but very interesting biography of Sir George Jessel, had said that Sir George was most remarkable for his wonderful power of quickly comprehending facts, and for the wonderful ease with which he penetreated into the intricate labyrinths of ledgers and books of account, and picked out exactly those facts on which the ultimate issue of the case must depend. There were many present that evening who in that respect, recognised in Sir Rusus Iseacs a formidable rival to the late Master of the Rolls. Throughout his career, no matter how exciting might have been the contest or the case, Sir Rufus Isaacs had always maintained a perfect and complete self-control. He had always shown an even, an unruffled temper, invariable courtesy, and, what was very important, generous kindness to his juniors; so that he had not at the English Bar a single enemy, nor even an unfriendly critic. The qualities of the Law Officers of the Crown would be subjected to a most severe test during the next two or three years. There would arise grave question,

relating to the laws of nations and the laws of peace; the more embarassing questions concerning the law of trade unions, and most momentous questions concerning constitutional law, practice, and procedure. They believed that the Attorney-General woud.pass through that ordeal with honour to himself and credit to the Government, and that his name would take an eminent and conspicuous place in the lists of Attorney-Generals of England.

THE ATTORNEY-GENERAL, who received an ovation on rising to reply, said that in responding to the toast he was supported by the proud conviction—for which pride he was sure they would forgive him—that he was the first member of the Jewish community to become His Majesty's Attorney-General. He was proud to state that fact in the presence of his brother Maccabæans, of Mr. Cohen, and other distinguished representatives of the Bench and Bar. He could not help also recalling that in his early days, as a student in the Middle Temple, he singled out one man among those he heard as the one to be followed. His chosen example was their chairman that night. He would remind then that the first member of the Jewish community to become a member of the Bar and also a Q.C. was Sir Francis Goldsmid, who chose the Bar as a career in order to open it to members of his community. To some extent he had travelled along the same path as Sir Francis Goldsmid, who sat in Parliament as the Liberal member for Reading, and who at one time occupied the house near that town which he (Sir Rufus) now resided in. Sir George Jessel, on whom he looked with the greatest awe, was the first member of their community to hold the office of Solicitor-General, and, as Master of the Rolls, ranked among the three greatest Equity judges this country had ever produced. He himself could lay claim to no higher distinction than that he had striven to the best of his ability to uphold the highest traditions of his profession, and that, serving the State as he now did with great pride, he gave such capacity and service as he could to the Government of the day. He was most grateful to the members of the Bench and Bar who were not members of the soceity who had come as guests to that dinner. There was no honour which could be greater than that which was conferred on a man by members of his own profession, with whom he was in daily contact, and not

always on the same side. When he looked at the smiling face and listened to the genial words of the Lord Chief Justice, he found it difficult to realise that when he had brought before Lord Alverstone a most carefully prepared argument as to the soundness of which he himself was convinced, the Lord Chief Justice had simply shattered his argument with one blow, and had left him helpless. He saw, too, his old opponent and lifelong friend, Sir Edward Carson. Through all the days that they had spent in opposition to each other at the Bar there had not been a single heated word—outside the court. There was no more glorious profession than that of the Bar. Some might add, 'provided you have some small measure of success,' but it was not necessary to be highly successsful to enjoy life at the Bar. If one were successful, then, although he lived laborious days, and sometimes laborious nights, nevertheless, in his experience, one could enjoy every hour and every minute of it. The Bar was never a bed of roses. If one were successful it was all roses and no bed; and if one were unsuccessful, it was all bed and no roses. There never was a more generous profession than that of the Bar. A man was taken for what he was, and not according to the place from which he came; he was judged according to his abilities and conduct. He thanked his brother members of the society and the visitors, for the reception they had given him, and assured them that he would never forget their kind and generous welcome.

LORD JUSTICE FLETCHER MOULTON, responding to the toast of The Bench and the Bar, proposed by Professor Meldola (President), said that in no country were the Bench and the Bar so closely coupled together as in England. Deeply rooted in all their ideas was that the barrister and the judge were two stages in the life of one organism. So close was the connection between them that he almost thought he ought to return thanks for the Bar, for it was impossible to over-estimate the assistance given by its members to the Bench. Those who fought before the Bench had their clients' difficulties to consider, but the judges had a no less difficult task. That was, amid all the contending arguments, to form decisions which would keep the law of England—based as it was on good sense—consistent, clear and practicable.

THE SOLICITOR-GENERAL, who responded on behalf of the Bar, in referring to Lord Justice Fletcher Moulton's observations on the intimate associations of the Bench and the Bar, said that the sword of justice in this country was two-edged. With one edge the advocate encountered his adversary in the tribunals of the land; with the other edge—made of the same tempered steel—the judge divided right from wrong, and cut the knot of difficulty. That was a fact which differentiated the legal institutions of this country from those of every other country in the world. It was for that reason, more than any other, that it was no exaggerated figure of speech to say that the Bar of England was a profession which was engaged in the pursuit of truth and the ascertainment of fact, rather than the multiplication of error and confusion of tongues. Its splendid and unique characteristic was that it was, of all the professions, the seat and focus of generosity between one member and another. Personally, he would be ungrateful and false to his own feelings if he did not acknowledge how much he owed to the kindness and assistance of Sir Rufus Isaacs, particularly in the first important case in which he acted as junior to him. It was his warm-hearted willingness to be friendly to his juniors, more than even his splendid qualities of intellect, which had made his appointment to the head of their profession, not only inevitable to the knowledge of his rivals and friends, but welcomed by every member of the profession.

LORD MERSEY, responding to the toast of 'The Visitors, proposed by Professor Gollancz, expressed his indebtedness to the Maccabæans for affording him an opportunity of joining in this tribute to Sir Rufus Isaacs. A great man he was, and he would give them one reason why he called him so. A good many years ago, when he was a busy leader he was briefed in a case, and his junior was a young man of whom he had not previously heard, Mr. Rufus Isaacs. He (Lord Mersey) never understood the case, but his junior apparently did, and he could not help on that account recognising him as a great man. The case was a ruby mine which did not exist, and it was only fair to say they lost the case. Sir Rufus Isaacs was, he added, not only an ornament of a great profession, but a kind and good friend.

SIR EDWARD CARSON, who, with Mr. Taylor, K.C., also responded to the toast, said that he was Sir Rufus Isaac's r aditional enemy. He had fought him 'all day and every day. He had fought his first case against him, and also his last before he (Sir Rufus) went to the upper atmosphere. Sir Rufus always tried to return the blow; but in all their encounters he had never hit below the belt. Sir Rufus Isaacs always preserved the highest traditions of the Bar of England, and he looked forward to the time when Sir Rufus Isaacs would occupy the greatest position to which any member of the Bar could aspire. He had regarded it an honour to act as sponsor for the Attorney—General's son on his admission at the Middle Temple, and he looked forward to the day when he would have him as his junior.

THE LORD CHIEF JUSTICE, in proposing the toast of 'The Chairman,' said: 'I am grateful to those who have organised this great banquet for allowing me the privilege of saying to the Society of Maccabæans what I have often said in private, and desire to repeat to you in public, how much you ought to honour the toast of the health of your Chairman. I was called to the Bar in 1868, and even at that time Mr. Cohen was one of the most distinguished juniors, not only on our circuit, but at the Bar practising in England, with an established reputation as a commerical lawyer, but with much more—an established reputation for honourable conduct and upright dealing in connection with his cases. It is no small privilege just to say what one cannot help feeling about a man who has been before the profession and before the public for no less than fifty-three years and still enjoys the respect and affection of everyone who ever knew him as a member of our great profession. Mr. Arthur Cohen wears no ribands, he has no stars he has but one addition to his name which, I am proud to think, was given him by the Conservative Party, to which he did not belong. He is one of the few rare instances of men who, though occupying no official position, by reason of their outstanding merit are selected for the honour of being one of His Majesty's Privy Council, and the only public recognition of this great career is that he is known as the Right. Honourable Arthur Cohen. But many of you young men here little know—and I speak without a shade of flattery—you little know what has

been the magnitude of the work and the opinion of the judgment of Mr. Arthur Cohen as a leader and a great lawyer. Many of us who are now administering indifferent justice would only have been too glad to have welcomed him among us as a predecessor and a colleague. In his wisdom he has withheld from us the privilege of his assistance, but after all, how many of you in the room know that Mr. Arthur Cohen is one of the oldest judges in England. He is a judge of the Cinque Ports, and long before I had Silk, in 1878, I practised before him in the Cinque Ports.

Mr. Arthur Cohen was one of the first counsel of the English Bar who ever appeared for Great Britain in a great international arbitration! I refer to the great arbitration—in some ways the greatest arbitration—the Geneva Arbitration, the pioneer of international arbitrations. That was in 1872, only about three-and-a-half years after I had been called. And Mr. Cohen had only been called twelve years. Mr. Cohen was chosen upon his merits. He had already acquired a high reputation for knowledge of international law, which in those days was not as much studied as at present. Many of you will remember the excitement in this country at the time. My predecessor, Sir Alexander Cockburn, played a prominent part in those proceedings. I have often talked to those engaged in that arbitration, men connected with the Foreign Office, and I can assure you that it would not be possible to over rate the services rendered to the country by Mr. Arthur Cohen in that great arbitration. It must be a great satisfaction to the Maccabæans that on such an occasion, historic from more than one point of view, when we are called together to do honour to the great and successful advocate who now fills the high post of His Majesty's Attorney-General, Mr. Arthur Cohen should be your Chairman. I am sure you will join with me in drinking to his health, and wishing him many years of health and enjoyment. There is no man more entitled to esteem and regard by reason of his high character and great abilities.

BOOK REVIEWS.

A Comparative Table of Cases in the Law Reports, Indian Appeals: By LALIT MOHAN MUKHERJI, M.A., B.L. Published by the Cranenburgh's Law Publishing Press, 3 to 5, Bowstreet, Calcutta. Price Rs. 2.—This supplies a long-felt want. Practitioners cannot, one and all of them, command a supply of the Indian Appeals; and a Table containing the references in Indian Appeals with the corresponding references to other reports, authorized and unauthorized, will be welcome to the profession. The same case is found reported in several private journals and also in one or otber of the several series of the Indian Law Reports, and when, as is often the case, a reference is given to only one or some of them. such a table as the one under review is highly useful to avoid comfusion and facilitate reference. To authors and publishers having to give all references to a particular case, their task is made particularly easy. We commend the book to all who have anything to do with Indian case-law.

Desai's Index: (1811—1909) *3rd Edition.* Price Rs. 10. We congratulate Mr. Desai on the success that has attended his Index. The Index is immensely popular and with the improvement the author has effected in this edition by way of giving the names of English cases, we are sure it will be found even more useful than before.

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

Broom's Legal Maxims, Eighth Edtion.

Ghose's Law of Mortgage in India, 4th Edtion, Vol I.

The Telugu Law Journal, by T. Purushotham Puntulu, Pleader, Bezawada.

Burge's Colonial and Foreign Law, Vol III, 1910. Price 30 s.

The Comparative Law of Marriage and Divorces, by A. W. Renton and G. G. Phillimore B. C. L. Price 30 s.

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Calcutta Law Journal	...	...	...	...	Do.
Calcutta Weekly Notes	...	...	...	...	Do.
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